RECORD AND BRIEFS

No. 16-1363

IN THE

Supreme Court of the United States

JOHN F. KELLY, SECRETARY OF HOMELAND SECURITY, ET AL.,

Petitioners,

—v.—

MONY PREAP, ET AL.,

Respondents.

(*Caption continued on inside cover*)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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—v.—

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QUESTION PRESENTED

These cases concern the proper construction of the mandatory detention provision of the Immigration and Nationality Act, Title 8 U.S.C. Section 1226(c).

Section 1226(c) is an exception to the general detention authority under Section 1226(a). Section 1226(a) authorizes detention of all noncitizens in removal proceedings, but affords individualized custody hearings at a noncitizen's request. At such a hearing, the noncitizen may seek release on bond only if she proves that she is neither a danger to the community nor a flight risk.

Section 1226(c), where applicable, precludes the immigration judge from conducting any custody hearing and mandates detention of a noncitizen even when the immigration judge would find that she poses no flight risk or danger. By its plain terms, Section 1226(c) directs that immigration officials "shall take into custody any alien who—[is subject to removal under the enumerated criminal grounds], when the alien is released" from the criminal custody.

The question presented is:

Whether Section 1226(c) imposes mandatory detention, without an individualized hearing on flight risk and danger, even when the Department of Homeland Security does not promptly detain an individual when she is released from criminal custody.

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INTRODUCTION

The government asks this Court to grant review and endorse its expansive construction of the mandatory detention provision of the Immigration and Nationality Act ("INA"), 8 U.S.C. Section 1226(c). It seeks to deny custody hearings to all persons in immigration proceedings who have ever been in criminal custody for certain offenses, *regardless of how long the individuals have lived peaceably and without incident in the community* after their release from criminal custody. Under the government's interpretation, individuals who can prove to an immigration judge that they pose no danger or flight risk will nonetheless be confined in immigration detention, often for months or even years on end. Review should be denied both because it is premature, and because the lower court decisions were correctly decided.

First, legislation is pending in Congress (and has passed in the House of Representatives) that would revise Section 1226(c) to impose mandatory detention regardless of when the Department of Homeland Security ("DHS") takes the noncitizen into custody—the very result the government seeks from this Court. In considering this bill, Congress has recognized that the existing statute does *not* provide for mandatory detention in these circumstances. The Court should decline the government's invitation to rewrite statutory language that Congress itself is in the process of reconsidering.

Second, the as-yet unresolved question of what constitutes "prompt" detention in these cases warrants deferring review. The court of appeals held that Section 1226(c) applies only where the

government takes an individual into custody "promptly" upon release, App. 27a, 59a, but because of the interlocutory posture of *Preap* and the summary and non-precedential character of *Khoury*, it has not yet determined what the prompt detention requirement entails. That question is arising in litigation in at least two circuits, the First and the Ninth. *See* Point I.B., *infra*. This Court will be better positioned to address the obligations of Section 1226(c) when the lower courts have had an opportunity to resolve that question.

Third, this Court is currently considering the proper construction and constitutionality of Section 1226(c) in *Jennings v. Rodriguez*, No. 15-1204. At a minimum, the Court should defer any review pending its ruling in *Jennings* on the scope of mandatory detention under Section 1226(c).

This Court should also deny review because the cases were correctly decided. By its terms, Section 1226(c) is a limited exception to the default detention statute, 8 U.S.C. § 1226(a), which generally authorizes the government to detain anyone in removal proceedings, unless an immigration judge finds that the detainee has met her burden of proving that she is neither a flight risk nor a danger to the community. The Ninth Circuit in *Preap* held that the unambiguous language of Section 1226(c) applies mandatory detention—that is, detention even where an individual can prove that she is neither a flight risk nor a danger—only to those noncitizens whom DHS detains "when the alien is released" from criminal custody. *See* App. 19a.

This construction is compelled by the plain language of the statute and advances Congress's

purpose: to focus limited detention resources on individuals who are presumed to pose the greatest flight and safety risks by ensuring that they are promptly transferred from criminal to immigration custody. *See* App. 22a-23a, 26a-27a. The government's contrary reading—whereby DHS would impose mandatory detention *any time after* an individual's release from criminal custody—would require it to impose mandatory detention on individuals who have been released months, years, or even more than a decade earlier, and who therefore have an actual record of living at liberty in the community without posing any flight risk or danger to others. As the court of appeals found, the government's construction of Section 1226(c) flouts Congress's text and purpose. *See id.*

The Ninth Circuit's rulings do not impose "a severe penalty [on the public] by mandating release of possibly dangerous defendants," as Petitioners claim. *See* Pet. 12 (quoting *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 720 (1990)). The rulings do not mandate the *release* of anyone. DHS is authorized by Section 1226(a) to detain anyone placed in removal proceedings. The only consequence of the court of appeals' ruling is to afford a bond hearing before an immigration judge to individuals not promptly detained "when . . . released," at which the noncitizen bears the burden of proving a negative to obtain release on bond—namely, that she poses no danger or risk of flight. The only persons released will be those who are able to defeat a presumption that they are a flight risk and danger, to the satisfaction of an immigration judge. All others will remain in detention. *See* App. 25a-26a.

The government's petition should be denied.

STATEMENT OF THE CASE

I. Legal Framework

Section 1226 of Title 8 of the U.S. Code governs the detention of noncitizens during removal proceedings. It affords the government substantial detention authority in every case, permitting release on bond only when an immigration official finds that a noncitizen in removal proceedings has affirmatively overcome a presumption that she poses a flight risk and a danger. This is a heavy burden, requiring the detainee to prove a negative in order to win a bond order.

Section 1226(a) sets forth the Secretary of Homeland Security's general discretionary detention authority and provides that DHS may arrest and detain any individual pending a decision on her removal. It states that, "*[e]xcept as provided in subsection (c),*" DHS "may continue to detain" the individual or "may release" the individual on either bond or conditional parole. 8 U.S.C. § 1226(a) (emphasis added). If the government detains a noncitizen under Section 1226(a), that noncitizen may seek review of the decision by an immigration judge at a custody hearing. *See* 8 C.F.R. § 1236.1(d); *Matter of Guerra*, 24 I. & N. Dec. 37 (BIA 2006). But at such a hearing, the government enjoys a presumption in favor of detention, and the noncitizen bears the burden of proving she is neither a danger to the community nor a flight risk in order to secure release from detention. *Guerra*, 24 I. & N. Dec. at 40.

Section 1226(c) is a narrow exception to the general detention provision created by Section

1226(a). In certain circumstances arising from enumerated criminal grounds for the removal charge, Section 1226(c) requires detention without a bond hearing even when an immigration judge would find that the noncitizen has proved that she is neither a flight risk nor a danger to the community. Section 1226(c) provides as follows:

> (1) Custody
>
> The [Secretary of Homeland Security][1] shall take into custody any alien who—
>
> (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,
>
> (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
>
> (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence [sic] to a term of imprisonment of at least 1 year, or
>
> (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

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[1] Although the statute refers to the "Attorney General," the Attorney General's detention authority under Section 1226 is shared with the Secretary of Homeland Security. Homeland Security Act of 2002, Pub. L. No. 107-296, § 441, 116 Stat. 2135, 2192.

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(2) Release

The [Secretary of Homeland Security] may release *an alien described in paragraph (1)* only if the [Secretary] decides pursuant to section 3521 of Title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the [Secretary] that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

8 U.S.C. § 1226(c) (emphasis added).

Thus, Section 1226(c)(1) requires that the Secretary take custody of the noncitizen "when the alien is released" from custody for one of the enumerated criminal offenses. Section 1226(c)(2) then prohibits the release of "an alien described in paragraph (1)" during the pendency of her removal case—except for the limited purposes of the federal witness protection program. In other words, if an

individual falls into the class of persons defined by Section 1226(c)(1), she has been taken into immigration custody when released from criminal custody, and will be maintained in custody and denied a bond hearing during her removal proceedings. Otherwise, the general detention statute, Section 1226(a), applies, and an immigration judge conducts an individualized custody hearing, which, as noted above, leads to release on bond only if the noncitizen can prove that she is neither a flight risk nor a danger to the community.

II. Factual Background

The government seeks certiorari in two parallel cases decided by the Ninth Circuit, *Preap v. Johnson*, 831 F.3d 1193 (9th Cir. 2016), and *Khoury v. Asher*, 667 F. App'x 966 (9th Cir. 2016) (unpublished memorandum disposition). App. 1a, 58a. In each case, a lead plaintiff and two other named plaintiffs filed a class action complaint on behalf of themselves and similarly situated individuals. Class members in both *Preap* and *Khoury* are individuals who were convicted of a removable offense listed under Section 1226(c)(1), released to their families after completing their criminal sentences, and later subjected to mandatory detention by the immigration authorities—in some cases *years* after they were released and living peaceably and without incident in the community. They challenge the government's application of Section 1226(c) to individuals who were not detained "when . . . released" from criminal custody.

Although the government repeatedly asserts that the Ninth Circuit rulings apply to "terrorists," both the *Preap* and *Khoury* class certification orders

specifically exclude noncitizens held under the detention statutes Congress has enacted for removal cases implicating terrorism and national security. *See* App. 80a-81a, 95a n.11, 131a-32a. These other statutes, not at issue here, explicitly authorize detention without bond hearings for national security detainees, but subject their cases to high-level review within the Department of Justice. *See* 8 U.S.C. § 1226a(a) (authorizing immigration detention with specialized review procedures in national security cases); 8 U.S.C. § 1537 (authorizing detention for noncitizens in proceedings before the Alien Terrorist Removal Court). Moreover, the government has never identified an individual charged as a terrorist in the plaintiff classes, nor has it explained why the authority Congress specifically provided for mandatory detention in national security cases does not suffice to protect public safety. *See* App. 80a & n.6.

A. Mony Preap

Mony Preap has been a lawful permanent resident since 1981, when he was brought to the United States as an infant. App. 6a. He was born in a refugee camp after his family fled Cambodia's Khmer Rouge. *Id.* Mr. Preap is the primary caretaker for his son, a United States citizen, as well as for his mother, who is in remission from cancer and suffers from seizures. App. 63a.

In 2006, Mr. Preap was convicted of two counts of possession of marijuana under section 11357(a) of the California Health and Safety Code. App. 64a. He was sentenced to time served and released from jail at the time of his convictions. App. 6a, 64a. Years later, in September 2013, Mr. Preap was convicted of

simple battery in violation of section 242 of the California Penal Code. App. 64a. Upon his release from criminal custody for that misdemeanor conviction—which is not a deportable offense and, more to the point, is not a criminal offense triggering Section 1226(c)'s mandatory detention provision—DHS arrested Mr. Preap, charged him as being removable from the United States as a result of his 2006 misdemeanor convictions for possession of marijuana, and subjected him to mandatory detention under Section 1226(c). App. 6a, 64a. Mr. Preap was detained for three months without a bond hearing until the conclusion of his removal proceedings, when he won his case through a grant of cancellation of removal under 8 U.S.C. § 1229b(a) and was released to his family. App. 6a-7a, 64a.

B. Bassam Yusuf Khoury

Bassam Yusuf Khoury has been a lawful permanent resident of the United States since 1976. App. 110a. In June 2011, Mr. Khoury was released after serving a 30-day sentence for a drug charge. *Id.* In April 2013, approximately 22 months after his release from criminal custody, DHS arrested Mr. Khoury at his home. App. 110a-11a. DHS charged him as being removable due to his 2011 conviction and, for the same reason, subjected him to mandatory detention under Section 1226(c). *See* App. 109a. Mr. Khoury was then detained for more than six months without any hearing, until October 2013 when he finally received a hearing pursuant to the Ninth Circuit's decision in *Rodriguez v. Robbins*, 715

F.3d 1127 (9th Cir. 2013).[2] *See* App. 109a-10a. An immigration judge found that he posed no flight risk or danger and ordered him released on an $8,000 bond. *See id.*

III. Procedural History

A. *Preap v. Johnson*

On December 12, 2013, Mr. Preap, along with two other lead plaintiffs, filed a petition for writ of habeas corpus and class action complaint on behalf of themselves and a proposed class of similarly situated detainees. App. 60a. The proposed class consisted of all "[i]ndividuals in the state of California who are or will be subjected to mandatory detention under 8 U.S.C. § 1226(c) and who were not or will not have been taken into custody by the government immediately upon their release from criminal custody for a Section 1226(c)(1) offense." App. 96a. Plaintiffs maintained that they were not properly subject to mandatory detention because they were not detained by DHS "when . . . released" from criminal custody, as Section 1226(c) requires. App. 72a.

On May 15, 2014, the United States District Court for the Northern District of California issued a preliminary injunction, finding that plaintiffs were

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[2] *See Rodriguez*, 715 F.3d at 1130-31 (affirming a preliminary injunction requiring bond hearings for individuals subjected to prolonged detention under Section 1226(c)). The Ninth Circuit subsequently upheld a permanent injunction to the same effect. *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015). That case is now pending before this Court. *See Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016).

likely to succeed on their claim that they were not subject to mandatory detention under Section 1226(c) because "the plain language of the statute commands the Attorney General to apprehend specified criminal aliens 'when [they are] released,' and no later." App. 77a. The district court also examined the legislative history of Section 1226(c), which demonstrated that "Congress wanted to ensure that certain criminal aliens would not be released following time served for certain offenses" by requiring a "seamless transition from state to federal immigration custody." App. 84a. The district court certified the proposed class and entered a preliminary injunction ordering an immediate bond hearing for Plaintiffs and class members. App. 61a. The government filed an interlocutory appeal from the district court's preliminary injunction.

A unanimous panel of the Ninth Circuit affirmed the district court's preliminary injunction, agreeing that plaintiffs were likely to succeed on their claim that Section 1226(c) applies only to individuals whom DHS detains "promptly" upon release. App. 27a. The court concluded that this reading of the statute was consistent with Congress's purpose of ensuring that noncitizens who present "heightened risks" associated with certain crimes are promptly placed in mandatory detention, noting that "Congress's concerns over flight and dangerousness are most pronounced at the point when the criminal alien is released." App. 22a. Because the named plaintiffs had lived for many years in the community before being detained, and the government had not challenged the scope of the class, the court of appeals concluded that it did not need to resolve, for purposes

of the preliminary injunction, what constituted a prompt detention. App. 27a-28a.

B. *Khoury v. Asher*

On August 1, 2013, Mr. Khoury and two other lead plaintiffs filed a petition for a writ of habeas corpus and class action complaint on behalf of themselves and a proposed class of similarly situated individuals in the Western District of Washington. App. 107a, 132a. Plaintiffs argued that Section 1226(c) did not apply to them because they were taken "into [immigration] custody well after their release from state custody, not 'when [they were] released.'" App. 113a.

On March 11, 2014, the United States District Court for the Western District of Washington certified a class and entered a declaratory judgment for Plaintiffs. App. 107a-08a. The district court certified a class consisting of "[a]ll individuals in the Western District of Washington who the government asserts or will assert are subject to mandatory detention under 8 U.S.C. § 1226(c) and who were not taken into immigration custody immediately upon their release from criminal custody for an offense referenced in § 1226(c)(1)." App. 132a. On August 4, 2016, the Ninth Circuit affirmed the district court's decision in a two-paragraph unpublished order by the same panel, citing to its decision in *Preap*, which it published on the same day. App. 58a-59a. Because it was unpublished, *Khoury* has no precedential value. *See* App. 59a; Ninth Circuit Rule 36-3. Like *Preap*, it did not address what constitutes prompt detention.

The Ninth Circuit denied the government's petitions for rehearing en banc in both *Preap* and *Khoury*. App. 139a-40a.

REASONS TO DENY THE PETITION

I. REVIEW BY THIS COURT IS PREMATURE.

A. Congress Is Considering Legislation to Amend Section 1226(c) to Comport with the Government's Position.

Review is premature because Congress is currently considering bills that would modify the statutory language in question to embrace the result the government seeks from this Court.[3] The House of Representatives recently passed legislation that would amend Section 1226(c) to apply mandatory detention to noncitizens *regardless* of when DHS detains them after release. *See* No Sanctuary for Criminals Act, H.R. 3003, 115th Cong. § 4(a)(3) (2017) (amending the statute to impose mandatory detention "*any time after the alien is released.*" (emphasis added)).[4] Thus, recognizing that the

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[3] The court of appeals based its ruling on statutory grounds alone. *See* App. 6a n.5.

[4] The proposed legislation would replace the "when . . . released" clause with the following:

> The [Secretary] shall take into custody any alien who [is inadmissible or deportable for a predicate crime] *any time after the alien is released*, without regard to whether an alien is released related to any activity, offense, or conviction described in this paragraph; to

existing statute does *not* provide for mandatory detention in these circumstances, Congress is currently considering whether to amend the statute to expand mandatory detention to additional persons, as urged by Petitioners. The Court should allow Congress the opportunity to revise the statute if it so chooses. *See* Stephen M. Shapiro et al., *Supreme Court Practice* § 6.37(i)(3) (10th ed. 2013) (explaining that where "Congress . . . is considering a modification or repeal of the provision at issue," the Court may "await a nonjudicial resolution of the issue presented . . . especially where debatable policy considerations are at issue").

B. Review Is Premature Absent Further Lower Court Proceedings on What Constitutes Prompt Detention for Purposes of Section 1226(c).

Review would also be premature in light of the ongoing proceedings in *Preap* on what constitutes prompt detention under Section 1226(c).

The court in *Preap* did not rule that DHS must take custody "at the precise moment of release," as Petitioners wrongly suggest. *See* Pet. 12 (internal quotation marks omitted). Indeed, the Ninth Circuit expressly declined to "require[] detention to occur at the exact moment an alien leaves custody," App. 27a, requiring only that DHS "promptly" take custody

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> whether the alien is released on parole, supervised release, or probation; or to whether the alien may be arrested or imprisoned again for the same offense.

H.R. 3003 § 4(a)(3) (emphasis added).

upon the person's release. *Id.*[5] At the same time, the Ninth Circuit declined at the preliminary injunction stage to specify "exactly how quickly detention must occur to satisfy the 'when . . . released' requirement." *Id.* Given that the case was set to return to the district court for discovery and further litigation with respect to a permanent injunction, the court concluded that it did not "need [to] decide for purposes of the instant appeal exactly how promptly an alien must be brought into immigration custody after being released from criminal custody." App. 28a.

Thus, the *Preap* case does not present a proper vehicle for resolution of the issues raised in the government's petition because of its interlocutory posture and because significant issues affecting the merits of the questions raised in the government's petition remain to be resolved on remand to the district court. *See Mount Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944 (2012) (Alito, J., concurring) (denial of certiorari appropriate where "no final judgment has been rendered and it remains unclear precisely what action the Federal Government will be required to take"); *see also* Stephen M. Shapiro et al., *Supreme Court Practice* § 4.18 (10th ed. 2013).

While the summary decision by the same panel in *Khoury* was not interlocutory, it left open

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[5] *See also* App. 27a (holding that "apprehension must occur with a reasonable degree of immediacy," such that "depending on the circumstances of an individual case, an alien may be detained 'when . . . released' even if immigration authorities take a very short period of time to bring the alien into custody."); Pet. 14, 17 (acknowledging the Ninth Circuit's prompt detention rule).

the same question as in *Preap*. Because the panel opted not to issue a precedential decision, both the district court and the court of appeals will be able to address this question in the first instance after the parties have an opportunity to develop a record in *Preap*.[6]

Moreover, parallel litigation on the same issue is currently pending in the First Circuit, which recently directed a district court to determine what constitutes a "reasonable" delay in detention under Section 1226(c). *See Gordon v. Lynch*, 842 F.3d 66, 71 (1st Cir. 2016). In *Gordon*, the First Circuit vacated a class-wide injunction requiring the government to provide a bond hearing where DHS fails to detain the noncitizen within 48 hours (or, if a weekend or holiday intervenes, within five days) after release from criminal custody. The court of appeals remanded for further proceedings on the proper scope of relief, where DHS would be "requir[ed] . . . to

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[6] Review is unwarranted in both *Preap* and *Khoury* for the reasons set forth herein. But, at a minimum, the Court should decline to grant review in *Khoury*. That case is an unpublished, non-precedential decision that merely applies the reasoning in *Preap*. The government concedes that both cases raise identical legal issues. *See* Pet. 1. Granting review in both cases would be contrary to judicial economy. Thus, should the Court be inclined to exercise review, the Court should stay the government's petition in *Khoury* pending review in *Preap* alone. *See Stutson v. United States*, 516 U.S. 163, 181 (1996) (Scalia, J., dissenting) ("We regularly hold cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted *in order that* (if appropriate) they may be [granted, vacated, and remanded ("GVR'd")] when the case is decided."); *accord* Stephen M. Shapiro et al., *Supreme Court Practice* § 14.6 (10th ed. 2013).

articulate its position on what constitutes a reasonable custody gap under § 1226(c), as well as what practical problems, if any, have resulted from the remedial order since its issuance." *Id.* at 71. Thus, as in *Preap*, the district court in *Gordon* also will address what it means to detain "when the alien is released" for purposes of Section 1226(c). The fact that this issue is still percolating among the lower courts is another reason that this Court's review would be premature.

In addition, review is unwarranted in this case because there is no factual record on which to assess the government's assertions about the practical implications of the court of appeals' ruling. *See, e.g.*, Pet. 8-9, 15-16. For example, Petitioners assert that a number of state and local jurisdictions decline detainer requests, preventing DHS from detaining persons at the time of their release. *See* Pet. 13. But there has been no record developed that would allow the Court to assess whether such declined requests actually prevent DHS from taking prompt custody or the frequency with which detainers are declined for individuals who fall within the scope of Section 1226(c).[7] Nor is there a developed record on the array of other enforcement tools that enable DHS to detain individuals promptly upon their release from

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[7] The report Petitioners cite (*see* Pet. 13) itself documents a "77 percent drop in declined requests for transfer (from 8,542 in FY 2015 to 1,970 in FY 2016)" in FY 2016 due to "increased local law enforcement agency cooperation . . . and more selective and targeted issuance of detainers that align more closely to prioritized populations." *ICE Enforcement and Removal Operations Report Fiscal Year 2016*, at 9.

criminal custody. These include cooperative arrangements with the overwhelming majority of counties nationwide to notify DHS of individuals' release dates,[8] and the deployment of DHS officers[9] and deputized local law enforcement officers[10] at jails and prisons to apprehend individuals upon their release.[11]

A factual record on these issues will be developed on remand in *Preap*, and is currently being developed in litigation pending in the First Circuit. The district court has granted limited discovery on these issues, which is ongoing and will close on October 11, 2017. Scheduling Order 1, *Gordon v. Kelly*, No. 13-cv-30146 MAP (D. Mass. Apr. 13, 2017), ECF No. 194. But until such a factual record is developed and presented, this Court should not grant review. *See Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 737 (1998) (issue not ripe for review where "further factual development would significantly advance [the Court's] ability to deal

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[8] *See, e.g.*, Immigrant Legal Resource Ctr., *Searching for Sanctuary: an Analysis of America's Counties and their Voluntary Assistance with Deportations* 11 (Dec. 2016) (reporting based on DHS data that 94% of approximately 2,500 counties nationwide notify DHS when noncitizens are released from criminal custody).

[9] *See* ICE, *Criminal Alien Program*, https://www.ice.gov/criminal-alien-program (last visited June 22, 2017).

[10] *See* 8 U.S.C. § 1357(g).

[11] Petitioners did not seek stays of either orders of the district courts pending appeal to the Ninth Circuit, or the Ninth Circuit's orders pending their en banc petition or their petition to this Court to address any practical concerns.

with the legal issues presented" and "aid . . . in their resolution" (internal quotation marks omitted)).

In sum, because of the interlocutory nature of this appeal, the need for further elaboration of what "when . . . released" requires, and the need for development of a factual record on the assertions the government raises in its petition—questions that are still being litigated in the lower courts—this Court should defer any review for when the issue is properly presented after a final judgment in *Preap* or by another case.

C. This Court Is Reviewing the Scope of Mandatory Detention Under Section 1226(c) in *Jennings v. Rodriguez*.

Finally, this Court is presently considering the proper construction and constitutionality of mandatory detention under Section 1226(c) in *Jennings v. Rodriguez*, No. 15-1204. *Jennings* concerns, among other things, whether noncitizens who are "subject to mandatory detention under Section 1226(c) must be afforded bond hearings, with the possibility of release, if detention lasts six months."[12] Because the Court's ruling in *Jennings* could affect the issues presented here, granting review at this stage is premature.

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[12] *See* Pet. for Writ of Cert. I, *Jennings v. Rodriguez*, No. 15-1204 (Mar. 28, 2016).

II. THE COURT OF APPEALS' RULINGS ARE CORRECTLY DECIDED.

In addition to the problems set forth above, review should be denied because the Ninth Circuit's rulings are correct on the merits. As the Ninth Circuit correctly held, Section 1226(c) unambiguously imposes mandatory detention only on those noncitizens whom DHS detains "when [they are] released" from criminal custody—and not individuals, like Plaintiffs, whom DHS detains months or years after they have returned to their families and communities. This conclusion is compelled by the plain language of the statute; its context and structure; and Congress's purpose of focusing limited detention resources on individuals who are presumed to pose the greatest flight and safety risks by ensuring that they are promptly transferred from criminal to immigration custody.

The government makes three arguments in defense of its expansive interpretation of Section 1226(c), all of which lack merit.

First, the government argues that the plain language of the "when . . . released" clause does not limit the class of persons subject to mandatory detention under Section 1226(c), but instead merely directs the Secretary to detain the individual "any time after" her release from criminal custody. *See* Pet. 9-10. To the extent the statute is ambiguous on this issue, the government argues that the Board of Immigration Appeals ("BIA") decision adopting this interpretation in *Matter of Rojas*, 23 I. & N. Dec. 117 (BIA 2001), warrants *Chevron* deference. *See* Pet. 8, 9. However, as the Ninth Circuit correctly held, the government's expansive reading violates the plain

language by rendering the "when . . . released" language superfluous. Indeed, the government admits that, under its interpretation, the "when . . . released" clause has no significance with respect to its detention authority. *See* Pet. 9. Instead, the government would apply mandatory detention to an individual who completed a criminal sentence for a minor crime more than a decade ago, has satisfied any conditions of probation or parole, and has been living peaceably and openly in the community; is eligible for relief from deportation; and could prove that she is neither a flight risk nor a danger. The plain language of Section 1226(c) and all indications of its legislative purpose demonstrate that the mandatory detention of such individuals is not what Congress intended.

Second, the government argues that "when . . released" is ambiguous and can be read to mean "in the event that" the person is released, instead of requiring prompt detention. *See* Pet. 9 n.3. However—as the BIA itself recognized in *Matter of Rojas*—when read in context, the term "when" clearly requires a degree of immediacy. Thus, there is no basis for any deference to the government's *post hoc* litigation position, which conflicts with the agency's reading.

Third, the government argues that DHS's failure to detain the person at the time of her release is of no consequence under this Court's "loss of authority" doctrine, which provides that where a statutory deadline does not specify otherwise, the government does not lose authority to detain when it fails to meet the deadline. *See* Pet. 11-12. However, this argument is misplaced: the court of appeals'

ruling does *not* deprive DHS of detention authority, and DHS retains the authority to detain any individual in removal proceedings. The only consequence is to afford individuals who have not been promptly detained, and thus have been living at large, a hearing in which they bear the burden to prove that they are neither a risk of flight nor a threat to the community. The decision whether to maintain custody or release the person (and any conditions to attach to release) remains in the hands of an immigration judge.

A. The Plain Language and Purpose of the Statute Make Clear that Mandatory Detention Applies Only To Individuals Whom DHS Detains "When . . . Released" From Criminal Custody.

As the Ninth Circuit correctly held, Section 1226(c) "unambiguously imposes mandatory detention without bond only on those aliens taken by the [Secretary] into immigration custody 'when [they are] released' from criminal custody." App. 5a. As such, it does *not* apply to individuals, like Plaintiffs, who were only detained by DHS after returning to their homes and communities, months or even years after their release.

The plain language of the statute compels this conclusion, and that conclusion is reinforced by the statute's context and structure. As explained above, Section 1226(c)(1) directs DHS to take custody of a noncitizen who is "inadmissible" or "deportable" due to certain crimes "when the alien is released" from criminal custody. 8 U.S.C. § 1226(c)(1). Section 1226(c)(2) goes on to prohibit the release of "an alien

described in paragraph (1)"—which includes the "when . . . released" language. *Id.* § 1226(c)(2). Thus, when the paragraphs are read together, the plain language of the statute clearly imposes mandatory detention of noncitizens who are removable due to certain crimes and whom DHS detains "when [they are] released" from criminal custody.

Petitioners maintain that the "when . . . released" clause does not define who must be detained, but instead solely "defines when an *action of the Secretary* should occur" and that "when" effectively means "any time after." *See* Pet. 9-10. But this reading reduces the "when . . . released" clause to mere surplusage. *See TRW Inc., v. Andrews*, 534 U.S. 19, 31 (2001) ("a statute ought . . . to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void, or insignificant." (citation omitted)). As many courts recognize, "permitting ICE to detain an alien under 8 U.S.C. § 1226(c) anytime after the alien is released from custody would render the phrase 'when the alien is released' meaningless." *Deluis-Morelos v. ICE Field Office Dir.*, No. 12CV-1905JLR, 2013 WL 1914390, at *6 (W.D. Wash. May 8, 2013); *see also Castañeda v. Souza*, 810 F.3d 15, 41 (1st Cir. 2015) (en banc order affirming district court decision by evenly divided vote) (Barron, J.). As one district court responded,

> when else could the Attorney General take an alien into custody except when he or she is released? To read the statute in a manner that allows the Attorney General to take a criminal alien into custody without regard to the

> timing of the alien's release from custody would render the 'when the alien is released' clause redundant and therefore null.

Khodr v. Adduci, 697 F. Supp. 2d 774, 779 (E.D. Mich. 2010) (citation omitted). The government's inability to give any independent meaning to the "when . . . released" clause only confirms what the BIA itself acknowledged in *Matter of Rojas*: that its interpretation simply renders the "when . . . released" clause superfluous. 23 I. & N. Dec. at 125.

Moreover, as the Ninth Circuit concluded, "[i]f Congress really meant for the duty in (c)(1) to take effect 'in the event of' or 'any time after' an alien's release from criminal custody, Congress would have said so, given that it spoke with just such directness elsewhere in the IIRIRA." *See* App. 21a-22a (quoting *Castañeda*, 810 F.3d at 38 (Barron, J.) (citing 8 U.S.C. § 1231(a)(5) ("[T]he alien shall be removed under the prior order *at any time after* the reentry." (emphasis added) (alteration in original))).

The government, relying on *Matter of Rojas*, proposes an unnatural reading of "aliens described in paragraph (1)" that excises the "when . . . released" clause from paragraph (1) altogether. *See Rojas*, 23 I. & N. Dec. at 125. However, the agency is not permitted to pick and choose from the provisions that constitute paragraph (1). "We must presume that Congress selected its language deliberately, thus intending that 'an alien described in paragraph (1)' is just that—*i.e.* an alien who committed a covered offense *and* who was taken into immigration custody 'when . . . released.'" App. 14a (citing *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)); *see*

also Castañeda, 810 F.3d at 36 (Barron, J.) ("Congress clearly intended for the cross-reference in (c)(2) to refer to aliens who have committed (A)-(D) offenses *and* who have been taken into immigration custody 'when . . . released' from criminal custody, in accordance with the Attorney General's duty under (c)(1)."") (emphasis added); *Saysana v. Gillen*, 590 F.3d 7, 14-16 (1st Cir. 2009) (holding that the "when . . . released" clause cannot be excised from the definition of individuals subject to mandatory detention).

Had Congress wanted to include a provision barring release of any person who committed a predicate act without regard to whether they had been released and were now back living with their families, Congress could simply have required the mandatory detention of "an alien described in subparagraphs (1)(A)-(D)." The fact that Congress referred to *all* of "paragraph (1)", and *not* its subparagraphs, evinces its intent to include all of "paragraph (1)," including the "when . . . released" clause.[13]

Limiting mandatory detention to individuals detained "when . . . released" from custody is

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[13] Petitioners note that the Tenth Circuit in *Olmos v. Holder*, 780 F.3d 1313, 1320 (10th Cir. 2015), relied on a provision of the INA—8 U.S.C. § 1153(b)(5)(B)(i)—where Congress referred to "a new commercial enterprise described in subparagraph (A)", but the context showed it was referring only to the subparts (i) and (ii). *See* Pet. 10. However, the subparts (i) and (ii) were the only language in the statute that could arguably "describe" a "new commercial enterprise." *See also* App. 14a-15a.

consistent with the "structure and purpose of the statute." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996) (internal quotation omitted). The mandatory detention provision, Section 1226(c), is an exception to the general detention provision laid out in Section 1226(a). *See* App. 17a-18a. Exceptions to general rules are to be narrowly construed. *See City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731-32 (1995); *Comm'r of Internal Revenue v. Clark*, 489 U.S. 726, 739 (1989).

Moreover, the plain reading of Section 1226(c) effectuates Congress's purpose. "The mandatory detention provision does not reflect a general policy in favor of detention; instead, it outlines specific, serious circumstances under which the ordinary procedures for release on bond at the discretion of the immigration judge should not apply." *Saysana*, 590 F.3d at 17. Congress instructed that certain individuals should be detained without even an opportunity to prove that they are neither a flight risk nor a danger, but only when they are detained promptly, with no significant break in custody. Where, by contrast, DHS does not promptly take individuals into custody, but allows them to live at large, they may still be detained when placed in removal proceedings. The only consequence is that such individuals are afforded a hearing at which they can seek release on bond only if they can prove that they pose neither a flight risk nor danger. Thus, "the 'when released' language serves [the] . . . limited but focused purpose of preventing the return to the community of those released in connection with the enumerated offenses." *Id.*

Instead of focusing mandatory detention on high-risk individuals who are coming out of criminal custody, the government's expansive interpretation would sweep up individuals who have been living peaceably in the community for more than a decade, and pose neither a danger nor a flight risk. For example, Eduardo Vega Padilla, a named plaintiff in *Preap*, has been a lawful permanent resident since he came to the United States as a toddler in 1966. He has five U.S. citizen children and six U.S. citizen grandchildren. During a difficult period in his life, Mr. Padilla was convicted of possession of a controlled substance in 1997 and 1999. While he was on probation for the second conviction, officers searched his home and found an unloaded pistol in a shed behind his house. He was then convicted of possessing a firearm while having a prior felony conviction and sentenced to six months in jail. He was released in 2002. In August 2013, after *eleven years* of peaceful and crime-free life as a lawful permanent resident, DHS officers arrested Mr. Padilla at his home and held him in mandatory detention for the next six months. Ultimately, in February 2013, Mr. Padilla received a bond hearing pursuant to *Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013), where the immigration judge found he did not pose a danger or flight risk, and ordered him released on a $1,500 bond—the minimum amount permitted by the statute. *See* Responsive Br. of Pls.-Appellees 9-10, *Johnson v. Preap*, Nos. 14-16326, 14-16779 (9th Cir. filed Feb. 2, 2015). As the plain language of the "when . . . released" clause indicates, Congress did not intend that individuals like Mr. Padilla be subject to mandatory detention without any individualized custody review.

This example also shows how the "when . . . released" requirement of Section 1226(c) makes practical sense. When an individual is taken into custody immediately upon release from criminal custody, there will be little evidence available, making a hearing in which the noncitizen must prove that she is not a flight risk or a danger unlikely to result in release. Where, by contrast, an individual has been released and is living in the community, it was logical for Congress to provide for a hearing where the immigration judge decides whether the detainee's conduct during her period of release is sufficient to rebut the presumption that she is a danger and flight risk.

Petitioners' assertion that Congress was concerned with "'detaining . . . *all* criminal aliens,'" *see* Pet. 11 (quoting *Rojas*, 23 I. & N. Dec. at 122) (original emphasis), is incorrect. Section 1226(c) does not cover all criminal offenses that render persons deportable. For example, it does not encompass persons subject to deportability for domestic violence offenses under 8 U.S.C. § 1227(a)(2)(E). Nor would a person charged as inadmissible based on a firearms offense be subject to Section 1226(c)(1), in contrast to a person charged as deportable for such an offense. And of course Congress chose to impose mandatory detention only on individuals detained "when . . . released" from criminal custody. In short, Congress chose to impose mandatory detention not on all those with criminal convictions, but only on a select group of individuals under particular circumstances.[14]

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[14] The government's interpretation also raises serious constitutional concerns as it extends Section 1226(c)'s

B. As Determined by Both the Court of Appeals and the Board of Immigration Appeals, "When" Does Not Mean "In the Event that."

In arguing that the court of appeals should have deferred to its interpretation, the government asserts in a footnote that the term "when" is ambiguous and could refer to either "at or around the same time" or "in the event that." Pet. 9 n.3. However, the BIA did not base its conclusion in *Matter of Rojas* on a determination that the "when . . . released" clause is ambiguous in this respect. Petitioners' argument conflicts with the BIA's own conclusion that the statute "does direct the [Secretary] to take custody of aliens *immediately upon their release* from criminal confinement." *Rojas*, 23 I. & N. Dec. at 122 (emphasis added). The

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categorical deprivation of physical liberty to individuals whose last contact with the criminal justice system occurred years ago, and who have fully rehabilitated and re-established ties to their families and communities. As a panel of the First Circuit explained, "those who have resided in the community for years after release cannot reasonably be presumed to be dangerous or flight risks . . . particularly so given the breadth of offenses to which 1226(c) applies." *Castañeda v. Souza*, 769 F.3d 32, 47 (1st Cir. 2014), *reh'g en banc granted, opinion withdrawn* (Jan. 23, 2015), *on reh'g en banc*, 810 F.3d 15 (1st Cir. 2015). Subjecting an individual to detention under these circumstances, when she does not pose a flight risk or danger, would violate due process. *See id.* Under principles of constitutional avoidance, Section 1226(c) must therefore be construed to avoid the serious due process concerns presented by the mandatory detention of individuals detained regardless of when they were released from criminal custody. *See Clark v. Martinez*, 543 U.S. 371, 380-81 (2005).

government may not now construct *post hoc* justification for the agency's interpretation, but must rely upon the rationale used by the agency. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency").[15]

C. The "Loss of Authority" Cases Are Inapplicable to Determining the Scope of Mandatory Detention Under Section 1226(c).

Petitioners contend that their interpretation is consistent with this Court's case law holding that where a statutory deadline does not specify otherwise, the government does not lose authority to detain when it fails to do so within the required time. *See* Pet. 11-12 (citing, *inter alia*, *United States v.*

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[15] Even if Section 1226(c) were ambiguous—and it is not—the BIA's interpretation in *Matter of Rojas* warrants no *Chevron* deference because it leads to arbitrary and capricious results that are "unmoored from the purposes and concerns" of the statute. *Judulang v. Holder*, 565 U.S. 42, 64 (2011). Under the BIA's view, anyone who has been in custody for a relevant offense at any time after the statute's 1998 effective date—i.e., nearly 20 years ago and counting—is subject to mandatory detention at whatever point in the future DHS detains them. This reading would arbitrarily deny bond hearings to individuals who have returned to their families and communities, and lived peaceably and openly there for years. In such cases, an immigration judge will be able to fully evaluate flight risk and danger based on evidence accumulated from their time in the community.

Montalvo-Murillo, 495 U.S. 711, 717-18, 720 (1990) (holding that even where the government fails to comply with a statutory mandate that a judicial officer "shall" hold a bail hearing "immediately" upon a criminal defendant's first appearance, the government may still detain that person before trial, as holding otherwise would "bestow upon the defendant a windfall" and impose "a severe penalty [on the public] by mandating release of possibly dangerous defendants.")).

The "loss of authority" principle does not apply to this case for three reasons.

First, the government does not in fact lose its authority to detain under the court of appeals' interpretation. The government retains its authority to detain. The only consequence of failing to do so promptly is that the individual is afforded a custody hearing, after which an immigration judge will decide whether to maintain custody or release, depending on whether the individual has proved she does not pose a flight risk or danger. Thus, the government suffers no "sanction" under the Ninth Circuit's rulings, *see* App. 25a-26a, nor does the public suffer the "severe penalty" of the release of dangerous persons. The general detention framework provides ample authority to detain any individual who is a flight risk or danger to society. Indeed, it authorizes detention unless the individual can affirmatively prove a negative—that she is neither a flight risk nor a danger. *See Matter of Urena*, 25 I. & N. Dec. 140, 141 (BIA 2009) (explaining that bond must be denied if a person is a danger to the community); *Guerra*, 24 I. & N. Dec. at 38 (describing danger and flight risk test for bond). Because Section

1226(c) curtails, rather than expands, the government's discretion over detention, the effect of the Ninth Circuit's ruling is to reinstate the government's general authority under Section 1226(a) to detain or release individuals who are not timely detained under Section 1226(c).

Second, unlike the deadlines at issue in the cases applying this principle, Section 1226(c)'s "when . . . released" language sets forth a substantive description of the persons subject to the statute and not a mere procedural deadline. The "when . . . released" clause expressly describes *who* is subject to government action in the first place. In contrast, the deadlines in the "loss of authority" cases do not define the object of statutory regulation. *See Montalvo-Murillo*, 495 U.S. at 714; *Brock v. Pierce Cty.*, 476 U.S. 253, 260 (1986); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 62-65 (1993). Applying the principle here would contravene express statutory language limiting the persons subject to the statute.

Third, the "loss of authority" principle does not apply, as the Ninth Circuit recognized, *see* App. 26a-27a, because it would lead to an outcome that is contrary to the detention framework Congress sought to implement. Congress enacted the "when . . . released" clause in order to ensure a continuous chain of custody between the criminal justice and immigration enforcement systems for noncitizens with certain convictions, to avoid people being released who present a danger to the community or a risk of absconding. Permitting the government to delay apprehension and instead detain people months or years after their return to their

communities, without affording them any opportunity to show that they are not a flight risk or a danger, contravenes the purposes and design of the statute.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

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